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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-215

WALLACE LEWIS McLENNAN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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JURISDICTION

The respondent admits jurisdiction under the question presented, but denies its applicability and, therefore, denies that it raises a federal constitutional question.

OPINIONS BELOW

The petitioner's brief sets out the opinion of the Court of Criminal Appeals of Tennessee, along with the dissenting

opinion from that court; the judgment of the Court of Criminal Appeals of Tennessee; the opinion of the Supreme Court of Tennessee, and the judgment of that court, as appendix to his brief, at pages 7 through 38. Since petitioner's brief does not contain a copy of the Tennessee Supreme Court opinion on petition to rehear, respondent attaches same hereto as Appendix "A".

QUESTION PRESENTED

Respondent does not accept the petitioner's statement that the question presented is the unlawful stopping, arrest and seizure of evidence "for no reason other than general suspicion and the time of morning". Respondent would pose the question as follows:

QUESTION

Whether police officers may constitutionally stop a motor vehicle without a law having been violated, for the purpose of ascertaining identity, under the facts hereafter set out, without such constituting an arrest, and after stopping such vehicle whether the "plain view" doctrine applies.

STATEMENT OF THE CASE

At about 3:00 or 3:30 a.m. on the early morning of October 17, 1970, two city policemen, by the names of Don Cannon and Jimmy Alexander, were patrolling a business district in the city of Savannah, Hardin County, Tennessee. While patrolling down a particular street in this district they saw a car pull out from behind a garage which they knew had been closed for the day for a considerable number of hours. They also were aware that all of the other businesses in the near vicinity were closed at this

particular hour. Further, they knew that there had been a rash of break-ins or burglaries in this business district in recent months. The fact that this automobile was coming out from behind a closed place of business at 3:00 o'clock in the morning aroused their suspicion. They stated, further, that it was their practice to stop cars coming out from behind such businesses at such a time in the morning (B.E. p. 35). They observed that there were two occupants, both male, of the car. They started following the car, a gold colored 1968 RT Dodge, a short distance down Highway 45, and decided to stop it. They stopped the car, which they admitted was not being driven in any illegal manner, and Officer Cannon walked up to the driver's side of the car and Officer Alexander came up on the passenger's side and to the rear. When Officer Cannon reached the side of the car, he was able to see inside and saw on the floorboard of the back seat a sack containing a number of heavy tools of a type used by burglars. He asked the driver, who later was identified as the defendant herein, for identification. When the defendant opened the door and got out to reach for identification from his wallet, the lights came on inside the car and the officer could see these tools more clearly. At this point he arrested the defendant.

Officer Alexander, walking up on the passenger side of the car, looked in and stated that he too saw the tools from the outside of the car. He had the passenger, a man later identified as Jackie Welch, to get out of the car. Both the passenger and driver were "frisked" for weapons. In doing so Officer Alexander stated that he felt a ring of keys in Welch's jacket pocket. Welch also had some sawdust type dust on his clothing, and when the officers first looked in the car he was seated with his hands between his legs, holding a pair of work gloves.

The two were transported to the police station. Shortly thereafter, the officers learned that a grocery store, located some three hundred yards from the closed service station where the suspect car had pulled out, had been broken into by cutting a hole in the roof of the building. Exit had apparently been made by prising a lock off of rear doors from within. The sawdust type substance from Welch's jacket and gloves were identified by an FBI agent as being of the same type and fibre of the materials cut through to gain entrance to the grocery store. After finding that the burglary had occurred the officers returned to the police station where the two suspects were taken from the car. Prior to getting out of the police car, however, two officers saw the defendant pushing something down behind the seat of the patrol car. The officers then pulled the seat out and found a ring of keys, one of which fit a Coke machine and all of which were identified as keys coming from the burglarized food store.

In addition to the tools, the officers also found on the back seat of defendant's car two walkie talkie sets. The tools included two screw drivers, two crow bars, a sledge hammer, a hatchet, a wedge, a chisel and possibly other smaller tools, in a sack with the name of Memphis Linen Supply Company on it.

ARGUMENT

The petitioner attacks the legality of the arrest, search and seizure, and the introduction of the seized incriminating items into evidence. The law in this regard can be stated with assurance, but the application of a law to a particular set of facts is more difficult. The two police officers in question, Officers Cannon and Alexander, were assigned to patrol a business district in Savannah. A

number of burglaries had occurred in the area in recent times. As a result, they were suspicious of anyone acting in an unexplained manner. One of the officers testified that they were stopping any cars coming out of closed business establishments in this area at such late hours. These defendants pulled out of a closed service station known to the officers to have been closed for several hours, and the officers also knew that there was no business establishment in the entire block open at that time of night. They first followed the car in an attempt to ascertain where it was from. However, it bore Tennessee National Guard license tags and they do not indicate the county of issuance. The officers then stopped the car for the sole purpose of ascertaining, under the circumstances, who they were and what they were doing at that time of night.

The facts, under these circumstances, must dictate whether these officers acted lawfully in stopping the car in the first instance and, if that is answered in the affirmative, then there can be no question of the accompanying official arrest, because the officers, without searching the automobile, saw inside it and saw the evidence complained of on the floorboard of the car. If this is answered in the negative, then the question presented is one of whether or not the officers acted in good faith in pursuance of their duty to prevent crimes from happening, as well as their duty to apprehend following a crime. Admittedly, these officers were not state safety officials, or highway patrolmen and, therefore, had no obligation to stop the automobile simply for the purpose of checking the driver's license. However, the officers testified that they did not ask for a driver's license but simply asked the driver for identification, and while he was attempting to get out such proof of identity the officers then saw the incriminating evidence and subsequently made the arrest. If the initial

pursuing and stopping of the defendant's vehicle and examining of his identification, whether it be operator's license or not, was accuated by desire to determine if they could find any evidence of a crime, then evidence found under such circumstances would not be admissible, *Hughes v. State*, 145 Tenn. 544; *Cox v. State*, 181 Tenn. 344; and see particularly, *Reels v. State*, 210 Tenn. 92.

The State insists, however, that there is a difference in officers stopping an automobile under the guise of checking a driver's license, or other identity, and such is merely a subterfuge for engaging on a "fishing expedition" (see, *Robertson v. State*, 184 Tenn. 277) from that of officers acting in good faith, which results in a "stop and quizz" examination, as opposed to a technical arrest. In other words, an officer may lawfully arrest a person if a breach of peace is threatened in his presence and it is not necessary for the officers to see and know that the law is being violated. In fact, he may arrest a person in order to prevent a violation of a law. See, *Hughes v. State*, 145 Tenn. 544. This, of course, cannot be done on mere suspicion, but where the actions of the person and the surrounding circumstances are such as to indicate a threatened breach of peace, the arrest may be made. Stated a little differently,

> "In determining probable cause for making an arrest, all information in the officers' presence is fair inferences therefrom and observations, including past experiences, are generally pertinent."
>
> *Greer v. State* (1969)
> ____Tenn. Cr. Appls.____
> 443 S.W.2d 681.

The grounds for arrest, set out in Section 40-803, Tennessee Code Annotated, have been held by our Supreme Court

to be an embodiment of the common law. See, *Glavin v. State*, 46 Tenn. 283, and *Tinpenny v. State*, 151 Tenn. 669. By the common law, a peace officer may make an arrest on a charge of felony upon a reasonable cause of *suspicion* without a warrant, although it should afterwards turn out that no felony had, in fact, been committed. *Lewis v. State*, 40 Tenn. 127. Most of the cases cited by the defendant in the case sub judice, where our Court has held that an officer could not stop an automobile under the subterfuge of checking a license in order to gain possible evidence of a crime, was distinguished by our Supreme Court in *Dobbins v. State*, 206 Tenn. 59. In this case, the Court dealt with the question of the admission of illegal search and the Court, in distinguishing it from the other cases cited above, said that in *Dobbins*, which it affirmed, that there was no question of subterfuge as had been the case in the previous decisions cited therein. In a recent Federal case, the United States Ninth Circuit Court of Appeals, in *U.S. v. Jackson*, handed down September 13, 1971, Vol 10, No. 3, *Criminal Law Reporter*, found that the Fourth Amendment's prohibition against unreasonable searches and seizures was not violated by police officers who, minutes after receiving a robbery bulletin, stopped an out-of-state car occupied by three possible suspects, and questioned the suspects about their identity and residences and reasons for being in town. In fact, the Court said that it deems this the kind of alert, and investigation, and restrained intrustion specifically approved by *Terry v. Ohio*, 392 U.S. 1.

In a United States Court of Appeals, Tenth Circuit case, coming out of Oklahoma, (*U.S. v. Alberty*, Oct. 7, 1971, also reported in *Criminal Law Reporter*, Vol. 10, No. 3) that Court, after holding that a Oklahoma police officer's search and seizure of evidence, even though it violated a

state law, still satisfied the Fourth Amendment requirements to the Federal Constitution and was admissible in Federal Court, that Court then said that the weapon was obtained by policemen who violated an Oklahoma statute when it stopped and looked inside a car matching the general description of a car involved in a reckless driving complaint. The interesting thing about this holding was that they stated that the *limited* intrustion up until the time they saw the rifle in the car, satisfied the Supreme Court's analysis test announced in *Terry v. Ohio*, *supra*, and their seizure of the firearm was justified under the "plain view rule" of *Harris v. United States*, 390 U.S. 234. The "plain view rule" of *Harris v. U.S.*, *supra*, is the same as the law has been in Tennessee for many years, and was applicable in the case sub judice as a result of the officers, upon approaching the defendant's automobile, could see in it without a search and saw the incriminating evidence subsequently seized. This was the position taken by respondent in the state courts and in addition thereto the State would rely upon the well reasoned dissenting opinion of Judge Russell of that Court and upon the State Supreme Court's unanimous opinion and such court's opinion on the petition to rehear.

Additionally, as pointed out in the dissenting opinion in the Court of Criminal Appeals, there are four reasons why the conviction should be affirmed and, therefore, this petition dismissed to-wit:

1) Under the facts of the case the officers had grounds for a warrantless arrest. This is true under Tennessee law. *Jones v. State*, 161 Tenn. 370. There was no search involved and the arrest was made on "plain view" evidence with the officers having a right to be in the position to view the evidence complained of . *Harris v. U.S.*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992.

2) No arrest was made by the initial stopping of the car. The evidence is that none was intended until the burglary tools were seen. This is permissible under Tennessee law. See: *High v. State*, 188 Tenn. 166, 217 S.W.2d 744. Practically every state in the Union and the Federal courts recognize the right of an officer to investigate and make a limited detention. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889.

3) The objection to the introduction into evidence of the burglary tools was clearly waived when the defendant called his co-defendant (indicted but not tried with him) as his witness. The co-defendant testified on direct examination for the defendant that the tools were his alone and that he had placed them in the car. How, then, can this petitioner complain that this evidence was improperly admitted? This complaint would be barred under Tennessee law, as enunciated in *Lester v. State*, 216 Tenn. 615, 393 S.W.2d 288.

4) Finally, as pointed out in Judge Russell's dissent, in the state courts it is possible for evidence to be admissible even if an arrest were illegal because there is no constitutional immunity from an unlawful arrest. The constitution only guarantees freedom from unreasonable search and seizures. This is true of both the state and federal constitutions. The "fruit of the poison tree" doctrine, pronounced in *Wong Sun v. United States*, 371 U.S. 4, 83 S. Ct. 407, 9 L.Ed. 2d 441, has not been made to apply to state trials by this Honorable Court. In *Clewis v. Texas*, 386 U.S. 707, 18 L.Ed. 2d 423, 87 S. Ct. 1338, this Honorable Court, in Footnote 7 of its opinion, recognized that the state court had held that such doctrine was not applicable to state trials and refused to express an opinion thereon.

CONCLUSION

The Respondent, therefore, basically contends that the officers stopped the vehicle under circumstances that warranted such and, therefore, they had a right to be at the automobile at the time in question and under the "plain view" doctrine had a right to seize the obvious evidence of a crime. Since temporary restraint without arrest is recognized by both this state and the U.S. courts, as expressed in opinions of this Court cited above, there is no federal question presented.

Respectfully submitted,

ROBERT H. ROBERTS,
Assistant Attorney General
State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing reply on behalf of the State of Tennessee as Respondent herein, has this day been forwarded to adversary counsel, by first class postage paid mail, Honorable William Lee Lackey, Attorney-at-Law, Post Office Box 268, Savannah, Tennessee 38372, this _____ day of October, 1973.

ROBERT H. ROBERTS,
Assistant Attorney General

APPENDIX A

WALLACE LEWIS McLENNAN,
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STATE OF TENNESSEE,
Respondent.

Hardin Criminal

ON PETITION TO REHEAR

Petitioner has filed an earnest petition to rehear. He insists we overlooked the case of St. John v. State, 491 S.W.2d 629 (1973). It is true we did not mention that case in our opinion because it is not in point.

In that case, an officer illegally arrested St. John while he was sitting in his car on an alleged charge of reckless driving without a warrant and upon information alone.

After the illegal arrest, the officer noticed a pistol sticking from under the front seat. The Court of Criminal Appeals properly held the seizure of the pistol was also illegal, notwithstanding the plain view doctrine.

The petition is denied with costs.

CHESTER C. CHATTIN
JUSTICE

DYER, C.J.,
HUMPHREYS AND McCANLESS, JJ.,
AND WILSON, S.J., CONCUR.